

Decision **DRAFT DECISION OF ALJ KENNEY** (Mailed 12/15/2004)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Southern California Edison
Company (U-338-E) for Authority to Lease
Available Land on the El Nido-La Fresa
Transmission Right-of-Way to Target
Corporation.

Application 04-09-018
(Filed September 15, 2004)

**OPINION AUTHORIZING THE LEASE OF UTILITY
REAL PROPERTY PURSUANT TO PUB. UTIL. CODE § 851****Summary**

This Opinion grants Southern California Edison Company (SCE) conditional authority under Pub. Util. Code § 851 to lease utility property to Target Corporation (Target).¹ The SCE property is a 1.95-acre site located on SCE's 220 kilovolt El Nido-La Fresa transmission right-of-way in the City of Redondo Beach (Site). Target intends to construct a parking lot on the Site to serve a department store on an adjacent parcel. The lease will not interfere with SCE's utility operations, and the lease revenues will be split between SCE's shareholders and ratepayers under a previously approved sharing mechanism.

The authority granted by this Opinion is subject to the following conditions. First, the lease agreement allows Target to use SCE's property for any purpose allowed by law, as long as such use does not interfere with SCE's

¹ All statutory references are to the Public Utilities Code unless noted otherwise.

use of the property for utility-related purposes. This Opinion requires any change in use of SCE's property to be approved by the Commission.

Second, the Site is located on SCE's electric transmission right-of-way. It is possible that SCE may need to expand its transmission capacity in the future. This Opinion provides that SCE shall have the right to install new transmission facilities on the Site when deemed necessary by SCE or the Commission.

Finally, consistent with previous Commission decisions, this Opinion determines that ratepayers shall not be held responsible for any costs associated with environmental claims related to the tenancy or activities of the lessee.

Background

SCE filed Application (A.) 04-09-018 on September 15, 2004. Notice of the Application appeared in the Commission's Daily Calendar on September 23, 2004. There were no protests or other responses to the Application.

In A.04-09-018, SCE requests authority under Section 851 to lease the Site to Target in accordance with an Option Agreement between SCE and Target.² Edison has electric transmission facilities located on the Site. The Site is not currently used for other secondary purposes.

The Option Agreement gives Target the right, subject to Commission approval, to lease the Site for the purpose of constructing and operating a parking lot beginning on the date that Target exercises an option to enter into the lease. The initial term of the lease is 20 years, and Target may renew the lease for four additional 10-year terms. Target will pay annual rent of \$59,202 in

² The Option Agreement is appended to A.04-05-018. The Agreement is dated May 11, 2004.

Years 1-10 and \$68,082 in Years 11-20. Rent will be increased by 20% upon the exercise of each renewal option.

The Option Agreement provides that Target's activities must not interfere with the operation of SCE's facilities located at the Site. To that end, the Agreement forbids the use or storage of hazardous substances, explosives, or flammable materials on the Site. Any equipment used by Target must maintain at all times a clearance of at least 18 feet from overhead electrical conductors. In addition, Target must maintain a minimum radius of 50 feet around all tower legs and 10 feet around all poles and anchors, and Target must provide access roads to the Site that are at least 16 feet wide. Target is also required to:

- Pay all personal property taxes, general or special assessments, or other fees levied against the Site or the improvements to the Site;
- Obtain all permits and approvals for the construction and operation of its business on the Site;
- Maintain appropriate comprehensive general liability, auto liability, and worker's compensation insurance; and
- Indemnify SCE against all liability for damages or injury to persons on the Site except to the extent caused by SCE's negligent or willful misconduct.

SCE retains various rights under the Option Agreement, including the right to:

- Enter the Site at any reasonable time to inspect the property;
- Impose temporary restrictions on Target's right to enter, occupy, and use the Site in order to perform necessary work on the electrical facilities located on the Site; and
- Take back all or part of the leasehold by eminent domain or inverse condemnation.

The Option Agreement permits Target to use the Site for any purpose permitted by law, consistent with SCE's use of the Site for its power lines and equipment. Although Target must obtain SCE's consent prior to using the Site for purposes other than a parking lot, the Option Agreement stipulates that SCE's consent shall not be unreasonably withheld. If the Site is used for other purposes, the Option Agreement requires a rent adjustment to reflect the fair rental value of the Site for the other purposes.³

All revenues from the Option Agreement will be treated as Other Operating Revenue (OOR). In Decision (D.) 99-09-070, the Commission adopted a gross revenue sharing mechanism for certain types of OOR. Under the sharing mechanism, gross revenues from non-tariffed products and services like the proposed Option Agreement are split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been reached. All incremental costs are borne by shareholders. For those non-tariffed products and services deemed "passive" by the Commission, the revenues in excess of the annual threshold are split between shareholders and ratepayers on a 70/30 basis. OOR from the Option Agreement are "passive" for sharing purposes.

Discussion

SCE requests authority under Section 851 to lease utility property to Target. Section 851 states, in relevant part, as follows:

No [utility]...shall...lease...any part its plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so. Every such...lease...made other than in accordance with the order

³ Option Agreement, Section 5.1.

authorizing it is void...[Any lease] of property by a public utility shall be conclusively presumed to be of property that is not useful or necessary in the performance of its duties to the public, as to any...lessee...dealing with such property in good faith and for value....

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to Section 851. The primary standard used by the Commission is whether the transaction will serve the public interest. Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.⁴

The Commission has repeatedly held that the “public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.”⁵ We find that the proposed lease does not interfere with SCE’s operation or affect its ability to serve the public. We have defined “productive purposes” as encompassing activities that provide monetary benefits to ratepayers.⁶ Because ratepayers will receive 30% of the gross revenue from the lease with little or no increase in costs, we find that the property will be used for other productive purposes under the lease. Accordingly, the proposed lease is in the public interest and is hereby approved, subject to the conditions set forth below.

We place three conditions on our approval of the lease. First, the Option Agreement allows Target to use SCE’s property for any other purposes allowed by law, as long as such use does not interfere with SCE’s use of the property for

⁴ D.01-06-007, *mimeo*, p. 17.

⁵ See, for example, D.02-01-058, *mimeo.*, p. 7.

⁶ See, for example, D.04-03-019, 2004 Cal PUC Lexis 85, *12.

utility-related purposes. We do not believe that it is prudent to grant such sweeping authority for the next 20-plus years. We will require any change in use of SCE's property to be approved by the Commission.⁷

Second, the Site is located on SCE's electric transmission right-of-way. In its application, SCE does not address the potential future need to expand transmission capacity within the right-of-way. We believe that SCE might need to expand its transmission capacity during the next 20-plus years. To ensure that the public interest is protected, we will condition our approval of the lease on SCE having the ability to install new transmission facilities on the Site when deemed necessary by SCE or the Commission.

Finally, in D.01-05-005 the Commission limited ratepayers' responsibility for future environmental claims on leased utility property:

Should environmental claims, in whole or in part, related to the tenancy or activities of the lessee be made on SCE subsequent to the execution of the lease, SCE shall not seek recovery of any such claims, or defense of such claims, from ratepayers.
(D.01-05-005, *mimeo*, p. 3 and Ordering Paragraph 1.)

This provision is applicable here, and we adopt it as a condition of our approval.

Compliance with the California Environmental Quality Act (CEQA)

CEQA⁸ applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of

⁷ As discussed *infra*, our environmental review was limited to the use of the Site as a parking lot. Any change in use could require additional environmental review by the Commission.

⁸ Public Resources Code Section 21000, *et seq.*

the proposed activities.⁹ Because the Commission must act on SCE's Section 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead Agency or Responsible Agency under CEQA.

The City of Redondo Beach is the Lead Agency for CEQA review of the Target project, which includes construction of a surface parking lot underneath the SCE transmission lines on the north side of the store. The Commission is a Responsible Agency for the project. CEQA requires the Commission to consider the Lead Agency's environmental documents and findings before acting upon or approving the project.¹⁰ SCE's application includes the following environmental documents prepared by the Lead Agency for the Target project:

- The City's Draft Environmental Impact Report (EIR), dated November 2003;
- The Notice of Completion mailed to the State Clearinghouse;
- The California Department of Fish and Game Certificate of Fee Exemption, dated January 15, 2004;
- The Final EIR, dated January 2004;
- Resolution No. 9191 of the Redondo Beach Planning Commission, dated January 15, 2004, which (i) certified and adopted the Final EIR, (ii) adopted mitigation measures and a monitoring program, (iii) adopted a Statement of Overriding Considerations, and (iv) granted a Conditional Use Permit; and
- The Notice of Determination, dated January 16, 2004.

⁹ Title 14 of the California Code of Regulations (hereafter, CEQA Guidelines), Section 15002.

¹⁰ CEQA Guidelines Section 15050(b). The specific activities that must be conducted by a Responsible Agency are contained in CEQA Guidelines Section 15096.

We have reviewed the City's environmental documents and find them to be adequate for our decision-making purposes.

In evaluating the Target project, the Final EIR concluded that potential environmental impacts in the following areas were less than significant: parking; water quality; biological resources; cultural resources; energy and mineral resources; geology and soils; land use and planning; population and housing; public services; recreation; and utility service systems.

The Final EIR found potentially significant impacts that could be mitigated to less than significant levels in the following areas: aesthetics (light and glare); noise (short-term construction noise and long-term operational and traffic noise); traffic (short-term construction-related congestion and long-term traffic congestion at the intersection of Kingsdale & 177th Street); public safety (increased demand on City fire protection services); and solid waste (construction debris). Mitigation measures to reduce light and glare impacts included low-intensity lights, shielding, landscape buffers, and downward direction placement. Mitigations to reduce noise impacts included limitations on the time for deliveries and parking lot cleaning, shielding, locating equipment away from residences, limitations on construction hours, sound barriers, and development of traffic plans with specified routes. Mitigations to reduce traffic impacts included adjustments to minimize truck volumes during holiday shopping peaks, development of alternate routes, signs, restriping and dedicated turn lanes at Kingsdale Ave. & 177th Street, and parking prohibitions. Mitigations to reduce public safety impacts included sprinkler system installation requirements, security system installation, minimum unobstructed access requirements, exit design specifications, and requirements applicable to the storage of hazardous materials and commissary food sales. Mitigations to

reduce solid waste impacts included recycling and reuse on other construction sites to the extent possible. With respect to these potentially significant environmental impacts, we find that the City has adopted feasible mitigations and has reasonably concluded that the specified mitigation measures will either eliminate or substantially reduce the impacts to less than significant levels.

Finally, the Final EIR found significant and unavoidable impacts that could not be mitigated. These involved peak-hour traffic exceeding established thresholds at 3 intersections, long-term vehicle-related emissions exceeding threshold amounts established by the South Coast Air Quality Management District (SCAQMD), cumulative traffic noise increase along a residential segment of Kingsdale Avenue, and short-term construction-related emissions above established SCAQMD standards. In approving the project, the City Planning Commission adopted a Statement of Overriding Considerations (SOC) finding that the significant and unavoidable environmental impacts were outweighed by the following economic considerations: revitalizing the City's revenue base by providing retail opportunities; increasing local employment opportunities; and increasing competitiveness with other regional shopping centers.

With respect to these significant and unavoidable environmental impacts, we find that the City has identified reasonable economic benefits to justify its adoption of the SOC and project approval. Therefore, for purposes of our project approval, we adopt the City's mitigation and monitoring plan applicable to all potentially significant impacts that could be mitigated, and the SOC applicable to the significant but unavoidable environmental impacts.

Comments on the Draft Opinion

The draft Opinion of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure.

Categorization and Need for Hearings

In Resolution ALJ 176-3139, the Commission preliminarily determined that this proceeding should be categorized as ratesetting and that hearings would not be necessary. Based on the record of this proceeding, we affirm that this is a ratesetting proceeding and that hearings are not necessary.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Timothy Kenney is the assigned ALJ in this proceeding.

Findings of Fact

1. In A.04-09-018, SCE requests authority under Section 851 to lease the Site to Target. Target intends to use the Site to construct and operate a parking lot.
2. The construction and operation of the parking lot on the Site in accordance with the terms of the Option Agreement will not impair SCE's ability to provide electric utility service to the public.
3. All revenue from the lease in excess of a Commission-established threshold will be treated as OOR and shared 70/30 between SCE and its ratepayers pursuant to D.99-09-070. All incremental costs arising from the lease will be borne by SCE's shareholders.
4. The City of Redondo Beach is the Lead Agency under CEQA for the Target project.
5. On January 15, 2004, the City of Redondo Beach Planning Commission adopted Resolution No. 9191 that (i) certified and adopted the Final EIR for the

Target project, (ii) adopted a mitigation and monitoring plan, (iii) adopted a Statement of Overriding Considerations, and (iv) granted a Conditional Use Permit for the project.

6. On January 16, 2004, a Notice of Determination was filed by the City Clerk of the City of Redondo Beach finding that the Target project will have a significant effect on the environment, that mitigation measures were required and adopted as part of the approved project, and that a Statement of Overriding Considerations was adopted for the project.

7. With respect to the potentially significant environmental impacts identified by the Final EIR that could be mitigated, the City of Redondo Beach has adopted measures to eliminate or reduce those impacts to a less than significant level.

8. With respect to the significant and unavoidable environmental impacts identified by the Final EIR, the City of Redondo Beach has identified economic benefits that provide a reasonable justification for the adoption of the Statement of Overriding Considerations and project approval.

9. The Commission is a Responsible Agency under CEQA and has reviewed the City's environmental documents.

10. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. This is a ratesetting proceeding.
2. No hearings are necessary.
3. It is in the public interest to approve the lease, subject to the conditions identified in the body of this Opinion.
4. The City of Redondo Beach's environmental documents are adequate for Commission decision-making purposes. The findings, mitigation measures, and

overriding considerations adopted in these documents should also be adopted in this proceeding.

5. The following Order should be effective today so that Target may enter into the lease with SCE expeditiously.

O R D E R

IT IS ORDERED that:

1. Application (A.) 04-09-018 filed by Southern California Edison Company (SCE) for authority to lease a portion of its El Nido-La Fresa transmission right-of-way (Site) to Target Corporation (Target) pursuant to the Option Agreement appended to the Application is granted, subject to the conditions set forth in the following Ordering Paragraphs.

2. All costs and revenues from the lease shall be subject to the sharing mechanism set forth in Decision 99-09-070.

3. Target and its assignees or successors shall use the Site only for a parking lot. Any other use must be approved by the Commission.

4. SCE shall have the ability under the lease to install new transmission facilities on the Site when deemed necessary by SCE or the Commission.

5. SCE shall not seek to recover from its ratepayers any costs for environmental claims that are related, in whole or in part, to the tenancy or activities of the lessee subsequent to the execution of the lease.

6. The mitigation measures adopted by the City of Redondo Beach Planning Commission in Resolution No. 9191 and the associated Statement of Overriding Considerations are adopted as part of the Commission's approval of A.04-09-018.

7. SCE shall notify the Director of the Commission's Energy Division in writing of any extension or termination of the Option Agreement within 30 days after such extension or termination is executed.

8. This proceeding is closed.

This Order is effective today.

Dated _____, at San Francisco, California.